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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1139

ROBERT E. HOOPER,
Petitioner,

vs.

CHRYSLER MOTORS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1039

ROBERT E. HOOPER,
Petitioner,

vs

CHRYSLER MOTORS CORPORATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Respondent, CHRYSLER MOTORS CORPORATION, respectfully prays that the Petition for Certiorari be denied, and in support of this position, presents the following:

OPINIONS BELOW

The opinion rendered by the United States Court of Appeals for the Fifth Circuit is printed at 325 F.2d 321. The Trial Court's disposition of this case was a dismissal with prejudice, printed at p. 19 of the Printed Record in the Fifth Circuit.

QUESTION PRESENTED

Contrary to Petitioner's statement as to the question presented, the only question present in this case is:

Did the District Court abuse its discretion in any of the following actions?

(a) In overruling Petitioner's Motion for Continuance or postponement;

(b) In overruling Petitioner's Motion for Dismissal without prejudice;

(c) In granting Respondent's Motion for Dismissal with Prejudice after Petitioner's refusal to proceed to trial as directed by the Court.

FEDERAL RULES INVOLVED

The opinion of the District Court and the United States Court of Appeals for the Fifth Circuit was based upon Rule 41(b), Federal Rules of Civil Procedure. The pertinent part of this rule is as follows:

"(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against

him. . . . Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete. The Petitioner has omitted some dates and signatures from the instruments printed as Appendices to his Petition. In addition, while Petitioner sets out as Appendices several Motions made by Petitioner and orders relating to these motions, Petitioner has omitted several pertinent documents, including Respondent's Motion to Dismiss with Prejudice. This Motion appears beginning at page 15 of the Printed Record in the Fifth Circuit. The other omitted documents, dates, and signatures also may be found in the Printed Record. Respondent submits the following facts as controlling upon the question here involved:

1. To the date of dismissal with prejudice on November 26, 1962, this case had been on file for more than fourteen (14) months, it having been instituted by the filing of Petitioner's Original Complaint on September 20, 1961. (Motion to Dismiss with Prejudice, Printed Record, p. 15).

2. The parties hereto anticipated a trial of this case during the May, 1962, term of Court and to that end, a pre-trial hearing was conducted on May 18, 1962. (Motion to Dismiss with Prejudice, Printed Record, p. 16).

3. In order to permit Petitioner additional time for preparation, trial of this case was passed from the May, 1962, term over to the November, 1962, term. (Motion to

Dismiss with Prejudice, Printed Record, p. 16; stipulated as correct at close of Order Dismissing with Prejudice, Printed Record, p. 20).

4. The record is silent as to any claim that there was inadequate time or opportunity for preparation except for the contention that "for the past few days" immediately preceding November 23, 1962, Petitioner was not able to give his attorney the time "requested by him" in the preparation of the case for trial. (Plaintiff's First Motion for Continuance, Printed Record, p. 9).

5. On May 18, 1962, Petitioner was on notice that this case would be tried during the November, 1962, term and on November 1, 1962, the case was set for trial as Case No. 1 for 9:00 a.m., Monday, November 26, 1962. (Motion to Dismiss with Prejudice, Printed Record, p. 16).

6. Petitioner knew of his sister's pending hysterectomy operation at least five (5) days prior to the trial date, but he does not allege that any effort was made to change the date of the operation and thus avoid for him a conflict between the date of the operation and the trial date. (Plaintiff's First Motion for Continuance, Printed Record, p. 6).

7. Petitioner knew at least five (5) days prior to trial date that the reason he advanced in seeking a continuance was insufficient. (Motion to Dismiss with Prejudice, Printed Record, p. 16; stipulated as correct by Petitioner, Printed Record, p. 20; Transcript of Proceedings, Printed Record, p. 30).

8. The place of the trial is only about forty-eight (48) miles distant from the hospital where Petitioner's sister underwent surgery. (Motion to Dismiss with Prejudice, Printed Record, pp. 16, 17). Petitioner could have

been with his hospitalized sister before court in the morning and after court in the afternoon. (Transcript of Proceedings, Printed Record, p. 32).

9. On Monday, November 26, 1962, this case was called for trial. Because of Petitioner's absence, however, the Trial Judge ordered a second case to trial. After noon on the same date, the other case was completed and this case was again called for trial. By this time, the operation had been completed and no complications had arisen. Petitioner still declined to proceed with the trial and again refused to go to trial at any time during that week. (Transcript of Proceedings, Printed Record, pp. 27-29).

10. Petitioner refused to proceed to trial for reasons that the Trial Court declared to be inadequate (Transcript of Proceedings, Printed Record, p. 32; Order, Printed Record, p. 19). Petitioner thereby failed to comply with the order of the Trial Court (Order, Printed Record, p. 19).

11. Petitioner refused to proceed to trial at any time during the week beginning November 26, 1962 (Motion to Dismiss with Prejudice, Printed Record, p. 17; Transcript of Proceedings, Printed Record, p. 27).

12. On November 21, 1962, both counsel discussed a postponement to December 12, 1962, but consideration of this date was discontinued because of conflicting settings previously made for both Petitioner's and Respondent's attorneys. Postponement of the trial of this case to December 12, 1962, was not agreeable to Petitioner until November 26, 1962, but by that time Respondent had brought to Lubbock, Texas, for trial co-counsel and witnesses from Chicago, Illinois, Detroit, Michigan, Atlanta, Georgia, and Dallas, Texas (Transcript of Proceedings, Printed Record, pp. 30, 31).

ARGUMENT

The Petitioner asserts that he has been unconstitutionally deprived of a jury trial. An examination of the proceedings below shows that Petitioner did not raise this constitutional question until his Motion for Rehearing before the United States Court of Appeals for the Fifth Circuit. Prior to that time, his sole contention was that the Trial Court had abused its discretion in overruling Petitioner's Motion for Continuance and granting the respondent's Motion for Dismissal with Prejudice.

Petitioner's contention before this court that he has been deprived of a jury trial is misleading and inaccurate. The Petitioner not only was offered a jury trial, but in fact, was ordered to proceed with a jury trial. Petitioner deliberately refused to obey this order of the Trial Judge. The question before this Court is whether or not the trial court abused its discretion in ruling that Petitioner "without sufficient grounds to justify his action . . . failed and refused to comply with the order of this court that the trial of this case proceed." (Order, Printed Record, p. 19).

No party is entitled to a continuance as a matter of right, but the trial court has discretion to grant or deny a Motion for Continuance. *Jameson* v. *DuComb*, 275 F.2d 293, 7th Cir., 1960. Rule 41(b), Federal Rules of Civil Procedure, expressly provides that the trial court may in its discretion dismiss a case with prejudice if the Petitioner fails to obey an order of the court. *Link* v. *Wabash Railroad Company*, 270 U.S. 626; 8 L. Ed. 2d 734; 82 S. Ct. 1386 (1962).

The Petitioner argues that he was justified in refusing to proceed to trial because he personally was unable to be present for trial and therefore was entitled to a continuance. Petitioner's "inability" to be present for trial was not the result of his illness or of the illness of any member of his immediate family, but was caused by the Petitioner's desire to be with his sister after she had surgery, consisting of a hysterectomy, which involved no complications.

On the trial date, another case on the docket was first put to trial in order to afford Petitioner additional opportunity to reconsider his previous refusal to proceed to trial as ordered by the Court. After noon on the same date, trial of the other case was completed and again Petitioner's counsel, knowing the surgery to have been completed and there being no complications as a result of the operation, still declined to proceed with the trial and refused to go to trial at any time later in the week.

This operation was not an emergency. The doctor's affidavit indicated that he had been treating Mrs. Tilson for about a year. The date for the hysterectomy was set at least five (5) days prior to the operation to coincide with the exact time at which Petitioner's case was set for trial. While Petitioner's affidavit states that his sister became acutely ill a week prior to the 21st of November, the doctor's affidavit nowhere states that the sister was in any actual physical danger. A hysterectomy is not ordinarily a dangerous operation. Several questions arise: Why was it essential to wait at least five (5) days before proceeding with the operation? If the operation could be postponed for five (5) days, why could not the operation be postponed for seven (7) or eight (8) days until the trial was completed? To say the least, the selection of this exact time and date for the operation was peculiar.

and this fact in itself is sufficient to support the position that Petitioner's action was capricious and such as to defy the authority and orderly conduct of business of the court. As was said in *Cunningham* v. *United States*, 295 F.2d 535 (9th Cir., 1961, Dismissal with Prejudice approved):

> "The trial court was entitled to regard the affidavits of the parties plaintiff as implausible or as not actually reaching the crucial point of why the plaintiffs did not show up at the time appointed for the trial * * *." P. 536.

As pointed out by Judge Hughes in the present case, Petitioner would be with his sister every morning and evening after the trial had recessed. By the time that Petitioner finally refused to go to trial, the operation had been performed. No complications were described in the doctor's supplemental affidavit. This would indicate that the operation was "routine."

Perhaps a more flagrant indication of Petitioner's defiant action is found in his assertions to the trial court that not only was he unavailable for the trial on the date of the operation, but that he would also be unavailable at any time during the week following the operation. Under these circumstances, the trial court certainly did not abuse its discretion in denying Petitioner's Motion for Continuance.

Once the Motion for Continuance was denied and Petitioner refused to proceed to trial, the court was confronted with taking further action to enforce its order with respect to the requested continuance. If Petitioner's Motion for Dismissal without Prejudice had been granted, Petitioner could have then refiled his suit and he would have obtained his continuance. The court had no alternative but to dismiss the Petitioner's case with prejudice

in order to enforce its order denying the Petitioner's Motion for Continuance.

In addition, Rule 41(b), Federal Rules of Civil Procedure, authorizes involuntary dismissal for failure to comply with an order of the court. Here the trial court ordered that the case should proceed to trial. Petitioner refused and declined to comply. He was not physically, mentally or financially unable to proceed, but he deliberately chose to substitute his decision and judgment for that of a United States District Court. This type of capricious and defiant action, if permitted or encouraged, would thwart orderly judicial procedure and make a mockery of our courts.

The Petitioner requests that this Court establish a rule that the trial court shall be required to grant a continuance whenever in the sworn opinion of the attending physician illness or an operation to a party or a relative within the first degree "prevents" the party's attendance at the trial. The mere statement of this "rule" points out that this "rule" would remove an area of discretion from the trial judge and place the control of trial dates in the hands of a physician. The physician's action would not be subject to cross-examination and would not be reviewable by any court for abuse of discretion. The facts in the present case show the dangers of such a "rule". The Petitioner wishes to substitute his opinion for that of the trial judge as to whether or not he could be present at the trial. If every party could dictate to the trial court when and where he would be present for the trial as Petitioner desires to do, a trial judge would no longer have control of the docket. Such an interfegence with normal court proceedings cannot be allowed.

Petitioner's petition for a writ of certiorari is devoid of any questions of public importance warranting review

by this court. Petitioner's failure to obtain a trial was due only to his capricious refusal to proceed at the time this case was set for trial before a jury.

CONCLUSION

It is respectfully submitted that the trial court, far from abusing its discretion, disposed of this case in the only proper manner and therefore, the Respondent requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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and

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Of Respondent's Counsel

CERTIFICATE

Prior to the filing of this brief in this Court, a copy hereof has been mailed to Albert Smith, 909 Great Plains Life Building, Lubbock, Texas, Attorney for Appellant.

Of Respondent's Counsel